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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 490

AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., AMERICAN MOTORISTS INSURANCE CO. FEDERAL MUTUAL INSURANCE CO., and LUMBERMENS MUTUAL CASUALTY CO.,

Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Is the decision of the State court, that a defendant in an action for breach of a written television network sponsorship agreement cannot interpose an affirmative defense of illegality of contract under § 1 of the Sherman Antitrust Act where the contract is not on its face or in itself an agreement in restraint of trade and the agreement does not have as its very object one of the restraints forbidden by the said Sherman Act, in accord with applicable decisions of this Court?

Statement of the Case

Errors in the question presented and in the statement of the case in the petition herein and the omission of pertinent facts impel a further statement by the respondent.

At the outset we direct the Court's attention to the erroneous assumption made by the petitioners in asserting, as part of the question presented, that a United States District Court had previously held in an action between the same parties that the same allegations as are set forth in the answer herein constitute a *per se* violation of the Sherman Act. The Court did not so hold. (See discussion pp. 6-7).

The action in the state court was predicated upon the breach by petitioners of a written contract of sponsorship entered into between the respondent American Broadcasting-Paramount Theatres, Inc. (now known as American Broadcasting Companies, Inc. and referred to herein as "ABC") and petitioner insurance companies (collectively referred to herein as "Kemper").

In its answer to the amended complaint Kemper alleged as a complete affirmative defense that the contract was an agreement in restraint of trade within the meaning of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1.

On motion of ABC the defense was stricken by the Supreme Court of the State of New York in a decision by Mr. Justice Samuel J. Silverman reported at 42 Misc. 2d 939 and 249 N.Y.S. 2d 481 (Petitioners' Appendix* "A").

The order striking the defense (PA "E," at pp. 40a-43a) was unanimously affirmed by the Appellate Division of the Supreme Court on the opinion of the court below (PA "E," at pp. 44a-45a).

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* Hereinafter referred to by the prefix "PA."

After the trial of the action, wherein ABC was awarded damages in the total amount of $298,865.03 (including interest) under the contract (the deliberate and inexcusable breach of which was never seriously contested), the Court of Appeals unanimously affirmed the order of affirmance of the Appellate Division (PA "E," at 53a-55a).

The sponsorship agreement that Kemper breached (PA "F," at pp. 59a-71a and A*13-25) was entered into on August 15, 1962 after extensive negotiations commencing sometime prior to May, 1962 (RA 2, 7-8, 13-39). Under the terms thereof Kemper agreed to become a partial sponsor (alternate Wednesdays and Fridays) of the ABC evening network news program known as "Evening Report" during a 26-week period commencing October 17, 1962.

Three telecasts wherein Kemper appeared as the sponsor occurred before November 9, 1962. Kemper paid for such telecasts without objection and certainly without any suggestion that the contract was in violation of any antitrust act. Kemper did not pay for the November 9, 1962 telecast because of the facts hereinafter shown.

On November 13, 1962, after 4 of the Kemper sponsored telecasts of "Evening Report," a representative of Kemper's advertising agency orally advised ABC that Kemper was canceling its partial sponsorship of the program, and the following day a written letter of cancellation was delivered to ABC (RA 3-4; A341). Kemper's reason for said cancellation was not based upon any asserted violation by ABC of the antitrust laws; Kemper cancelled the contract because on November 11, 1962 ABC telecast a program, conducted by news commentator Howard K. Smith, entitled "The Political Obituary of Richard M. Nixon," upon which Alger Hiss appeared (RA 4). Because

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* References to Kemper's Appendix on its appeal to the Court of Appeals are referred to herein by the prefix "A." References to ABC's Appendix on said appeal contain the prefix "RA."

of his appearance on the program, James S. Kemper, President of the Kemper Insurance Companies, publicly announced that his companies would no longer sponsor "Evening Report" and in a newspaper article appearing in The New York Times on November 16, 1962 he is reported to have said "his Companies' policy holders and others had objected to Kemper's association 'with a TV chain' which gave a platform to Alger Hiss" (RA 4-5).

On January 9, 1963, after unsuccessfully attempting to induce Kemper to resume its sponsorship, ABC instituted suit in the Supreme Court of the State of New York for breach of contract. Shortly thereafter, on January 15, Mr. Kemper issued the following press release, again without any suggestion that the contract was in violation of the antitrust laws:

> "To our policyholders, the members of our boards, and the agents who represent us, the replacement of an Armistice Day program intended to memorialize men who had died for their country in war with a program which smeared Richard Nixon, was obviously in poor taste. To present a convicted perjurer, convicted because he lied about his communist associations and activities, as a witness to the character of a man who had served his country in many capacities, was absolutely reprehensible.
>
> "The furor provided by the Hiss appearance, evidenced by newspaper editorials, letters to the editors, the condemnation of ABC by unanimous vote of the Illinois State Senate, protests by veterans organizations, the flood of letters and telephone calls on us, clearly showed the kind of image we could expect to suffer as a sponsor of an ABC news broadcast." (RA 10-11)

ABC's amended complaint (PA "F"), served May 3, 1963, set forth a cause of action for services rendered and facilities supplied in connection with the November 9, 1962 telecast of "Evening Report" and a second cause of ac-

tion for damages for breach of contract because of Kemper's refusal to sponsor the remaining 22 telecasts.

In its answer (PA "G"), served May 23 1963, Kemper pleaded six complete affirmative defenses, two partial affirmative defenses and two counterclaims.

The sixth complete affirmative defense (PA "G," at pp. 76a-89a), the only one presently involved, alleged a violation by ABC of § 1 of the Sherman Act and the allegations thereof were "practically identical" to those set forth in a complaint for treble damages and an injunction filed on the same day in an action instituted by Kemper against ABC in the United States District Court for the Southern District of New York (p. 6 of Kemper's petition).

The said affirmative defense sets forth in 13 pages and 33 paragraphs of Kemper's answer numerous allegations, completely dehors and collateral to the contract, concerning ABC's business relations and agreements with its network affiliated stations and with its advertisers, i.e., the sponsors of its network programs. In effect, Kemper in the guise of a defense to its unjustified breach of the "Evening Report" sponsorship agreement has attacked the basic foundations of television network broadcasting by interjecting matters foreign to said agreement and the breach thereof.

The principal allegations of this defense relate to three general subjects, all of which are collateral to the contract itself and thus would require the court, in adjudicating the merits thereof, to go behind the contract that is the subject of the suit, namely: (a) a description of the operations of the television network industry and the sponsoring of television programs (paragraphs 55-68); (b) ABC's agreements and arrangements with its affiliated stations and with advertisers as alleged in paragraphs 69 and 72, which Kemper states were entered into for the purposes alleged in paragraphs 69 and 70;* and (c) the negotiations

* See PA "G," at pages 84a-85a.

between ABC and Kemper's advertising agency prior to the time that the agency, on Kemper's behalf, entered into the sponsorship agreement (paragraphs 53 and 73-75).

On August 14, 1963 United States District Court Judge Irving Ben Cooper denied ABC's motion to dismiss Kemper's antitrust complaint in a decision reported at 221 F. Supp. 848 (PA "C"). The motion was made under Rule 12(b)(6) of the Federal Rules of Civil Procedure solely upon the complaint.

The sponsorship agreement which was the foundation of the State Court action had not been annexed to Kemper's complaint and was not before the District Court.

Thus the only issue to be decided was whether the allegations of the complaint concerning "the structure of the television industry insofar as it relates to the agreements made by ABC with its affiliated stations and potential sponsors" (PA "C," p. 28a) and ABC's actions during its negotiations with Kemper prior to the execution of the agreement were sufficient to state a claim for relief under the Sherman Act. It is significant that Judge Cooper prefaced his opinion with this statement:

> "This is a motion by defendant pursuant to F.R. Civ.P. 12(b) (6) to dismiss the complaint for failure to state a claim upon which relief can be granted . . .
>
> "As to Rule 12(b) (6): For purposes of such a motion, all the material allegations in the complaint are deemed true. Further, in determining the merits of the motion, it must be borne in mind that, '* * * a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' 2 Moore's Federal Practice, 2d Ed. (1962), p. 2245." (PA "C," at p. 27a) (Emphasis by the Court.)

We state emphatically that the court did not hold that the complaint alleged a *per se* violation of the Sherman Act, as indicated by Kemper in its Statement of the Case, page 7 of its petition. The court merely referred to Kemper's *contention* that the allegations of the complaint set forth conduct that was unreasonable *per se*, stating: "Plaintiffs contend . . . that these agreements [between ABC and its affiliated stations and its advertisers] were a per se violation of the Sherman Act" and "This . . . constituted, Kemper maintains, a per se violation of Sec. 1 of the Sherman Act" (PA "C," at pp. 28a and 30a). The court did not hold that the ABC-Kemper sponsorship agreement or even the conduct of ABC during the negotiations constituted a *per se* violation. After reviewing all of the allegations of the complaint, the court merely concluded: "It cannot be said, therefore, that plaintiff is not entitled to any relief if the facts as alleged can be proved and demonstrated to a certainty" (PA "C," at p. 31a).

Thereafter, on September 5, 1963 the New York Supreme Court granted ABC's motion to strike Kemper's sixth affirmative defense. The decision was *not* based upon a holding that the allegations thereof failed to state a violation of the Sherman Act, but upon the theory that even if a violation was adequately pleaded the defense nevertheless could not be interposed so as to defeat ABC's claim for damages for breach of the agreement. The court's reasoning was as follows (PA "A," pp. 3a-4a):

> (a) On its face, the ABC-Kemper agreement (a copy of which was annexed to the amended complaint (PA "F") and was thus before the State court) "is a perfectly valid one for sponsorship of the program on 130 stations" and "on its face this is not a contract having for its very object one of the restraints forbidden by the Sherman Act," such as "a contract to fix prices, or to divide territories between competitors, etc."

(b) The latest United States Supreme Court test for determining whether an antitrust defense can be asserted in an action for breach of contract is whether giving judgment for plaintiff "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act," quoting *Kelly* v. *Kosuga*, 358 U. S. 516, 520 (1959).

(c) The Supreme Court in *Kelly* v. *Kosuga, supra,* at 518 and 520, has stated that "as a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court," and to allow the defense to be interposed would be to create "a very strange class of private attorneys' general." To allow the defense would involve the same quality of capriciousness that the Supreme Court found in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 753 (1947), for the penalty would not be proportioned to the injury.

The court also remarked (PA "A," at p. 5a) that although a contract may "so violate the antitrust laws as to be unenforceable in the State courts," to disallow the defense in the present case (where the contract was not on its face an agreement in restraint of trade and where granting judgment for plaintiff would not make the court a party to carrying out an illegal restraint of trade) "would be consistent with the policy that enforcement of the federal antitrust laws should in general be in the federal courts only," a consideration that is "particularly apropos where as here defendants are actually pressing a suit in the federal court for relief under the antitrust laws." In the federal court action, it was stated, the Kemper Companies, "if entitled to it, can get full relief, bearing a rational relationship to the damage if any that they may have suffered," and there is "also an obvious advantage in not litigating these long drawn-out and expensive antitrust questions in two courts."

Summary of Argument

Under the tests set forth in Rule 19 of the Rules of this Court, it is clear that Kemper's petition for a writ of certiorari should be granted only if the federal question that Kemper has raised either has not heretofore been determined by this Court or has been decided in a way probably not in accord with the applicable decisions of this Court. The instant petition does not meet either test.

There have been numerous United States Supreme Court decisions discussing in great detail the circumstances in which a defense of antitrust illegality may be interposed and in every case but one, *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.*, 212 U. S. 227 (1909), this Court has held that the defense could not be interposed. The decision of the state court is perfectly consistent even with the *Continental Wall Paper* case for it was held that the contracts therein were "essential parts of an illegal scheme . . . and which had for their object . . . illegal ends," and a prior case wherein the defense had been disallowed was distinguished on the ground that the contract therein was "not in itself illegal." *Id.* at 261 & 260. These tests were applied by the state court when it held that the ABC-Kemper sponsorship agreement was "on its face . . . a perfectly valid one" and that "this is not a contract having for its very object one of the restraints forbidden by the Sherman Act" (PA "A," at p. 4a).

Furthermore, the present case cannot be distinguished in any way from the most recent case on this subject, *Kelly* v. *Kosuga*, 358 U. S. 516 (1959), and the state court correctly applied this decision in striking petitioners' affirmative defense.

The petition does not raise an issue of federal supremacy, for in striking the defense the state court applied a rule of law announced by this Court and not a New York State rule inconsistent therewith.

The result of the decision of the state court (which is consistent with the policy that enforcement of the federal antitrust laws should in general be in the federal courts only) was to thwart Kemper's attempt to transform a relatively simple breach of contract action into an antitrust proceeding, but it did not have the effect of depriving Kemper of its day in court. The merits of the antitrust issue will be determined in Kemper's treble damage action now pending in the United States District Court for the Southern District of New York, and if Kemper can prove ABC's violation of the Sherman Act it will be able to obtain compete relief in the said federal court action, *i.e.*, treble damages.

The arguments in the petition addressed to the *merits* of the affirmative defense (pp. 10-18) are completely irrelevant because the decision of the state court which the petition asks this Court to review did not involve the merits of the affirmative defense, *i.e.*, whether the facts alleged constituted a violation of the Sherman Act, but only the question of whether the defense could be interposed in order to defeat ABC's claim for damages for breach of contract. As in *Kelly* v. *Kosuga, supra,* where this Court stated in a footnote (358 U. S. at 518), "Without deciding the point, we shall assume that the petitioner's allegations duly charged a violation of the Sherman Act," the New York court assumed that the allegations of the defense duly charged a violation of the Sherman Act.

POINT I

The decision of the state court striking petitioners' affirmative defense is in full accord with the applicable decisions of this Court.

Rule 19 of the Rules of this Court states, in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The "question presented" at page 3 of the petition herein offers no reason to this Court for the exercise of its sound judicial discretion in favor of granting the writ. The state court has decided no federal question of substance not heretofore determined and certainly has not decided the question contrary to applicable decisions of this Court. On the contrary, the decision of the state court is in full accord with each and every one of the numerous decisions by this Court concerning the federal question as to the availability to a defendant in a contract action of an affirmative defense based upon alleged violations of the antitrust laws.

This Court first considered the availability of the defense of illegality under the antitrust laws in an action on a contract in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902), which was a suit to recover the price of pipes sold to the defendants. It was alleged as an affirmative defense that plaintiff was a "combination" consisting of various manufacturers and sellers of sewer and drainage pipe that had pooled their interests and agreed to maintain prices in excess of market value, said combination being in violation of the Sherman Act.

The Court, at 547-48, quoted with approval the statement in *Dennehy* v. *McNulta*, 86 Fed 825, 827 (7th Cir. 1898), that the mere fact that the plaintiff's "general business is illegal" (which is, in essence, the contention made by Kemper in paragraphs 69 and 70 of its answer, PA "G," at pp. 84a-85a)

"cannot serve, ipso facto, to create default or liability on its contracts generally; nor can such fact be in-

> voked collaterally to affect in any manner its independent contract obligations."

Accordingly, it was held in *Connolly* that although the court would not "lend its assistance" to the enforcement of an illegal contract (*id.* at 549) the defense of illegality was unavailable because the contract of sale was "collateral" to the alleged illegal combination. As to the latter the court said (*id.* at 551):

> "That combination may have been illegal, and yet the sale to the defendants was valid."

Seven years after *Connolly* this Court considered *Continental Wall Paper Co.* v. *Louis Voight and Sons Co., supra,* and in a five to four decision upheld the defense in an action for the unpaid balance on an account for merchandise sold and delivered to defendant.

The defendant, a wall paper jobber and wholesaler, alleged in his affirmative defense that plaintiff was a "combination" formed by over 30 companies manufacturing 98% of the wall paper sold in the United States for the purpose of monopolizing the wall paper business, eliminating competition and fixing prices. All of the output of these manufacturers was sold through plaintiff, and was sold only to those jobbers and wholesalers who were willing to sign a requirements contract (1) obligating them to buy from no one but the members of the combination and (2) requiring them not to sell the goods for prices less than those specified by plaintiff. *Id.* at 240-41 and fn. at 246-47.

Not only was the very existence of plaintiff illegal under §1 of the Sherman Act as a "combination . . . in restraint of trade," but the purchase agreement pursuant to which plaintiff had sold the wall paper to defendant was inherently illegal because of the two aforesaid provisions. The agreement stated that "the jobber will purchase [from

plaintiff] the entire requirements of the jobber in his business of selling wall paper" (*id.* at 246-47, fn.), and thus was illegal *on its face.* Furthermore, it was illegal on its face because of the aforesaid price fixing provisions contained therein.

Mr. Justice Harlan, writing for the majority, distinguished the *Connolly* case (in which he also wrote the majority opinion) on the ground that the defendant's contract therein "was to take certain goods at an agreed price, nothing more, and was not *in itself illegal.*" *Id.* at 260, emphasis added. It was not "part of" an illegal "general plan or scheme" and it was "wholly collateral to and independent of the agreement under which the combination had been previously formed." *Ibid.*

The Continental Wall Paper Co. purchase agreements (one of which had been signed by defendant), on the other hand, were held "to be based upon agreements that were and are essential parts of an illegal scheme . . . and *which had for their object* . . . to accomplish the illegal ends for which the Continental Wall Paper Co. was organized." *Id.* at 261, emphasis added. To award judgment for plaintiff, it was stated, under the facts and circumstances presented in that case would "give the aid of the court in making effective the illegal agreements that constituted the combination." *Ibid.*

Mr. Justice Silverman's decision in the instant case reflects this rule and theory for he stated that the ABC-Kemper agreement "on its face . . . is a perfectly valid one for sponsorship of the program on 130 stations" (equivalent to Mr. Justice Harlan's aforesaid characterization of *Connolly* as involving a contract "to take certain goods at an agreed price . . ., not in itself illegal") and that it is "not a contract having for its very object one of the restraints forbidden by the Sherman Act" (PA "A," at p. 4a).

The *Continental Wall Paper* case was distinguished in another major Supreme Court case, *D. R. Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165 (1915), which was an action brought in a Georgia state court for the amount due for glucose sold to defendant. There, as here, the answer of one of the defendants was stricken on motion and a judgment was entered for plaintiff, which was affirmed by the Georgia Court of Appeals (11 Ga. App. 588).

The defendant, relying upon *Continental Wall Paper*, alleged that plaintiff was a combination of glucose manufacturers organized for the purpose of monopolizing "all dealings in such products" in violation of the Sherman Act. Mr. Chief Justice White, speaking for a unanimous court, held that the defense of illegality could not be interposed, for "courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so." *Id.* at 172. It was stated that the ground for the decision in *Continental Wall Paper* was the *inherent illegality* of the contract which was sought to be enforced (*id.* at 177) whereas the provisions of the contract sought to be enforced in the case then before the court were "intrinsically legal." *Id.* at 173.

It is significant that in that case the defendant argued that although the provisions of the contract

> "were intrinsically legal, they become illegal as the result of the duty to consider them from the point of view that one of the parties was an illegal combination interested in inserting such conditions as an efficient means of sustaining its continued wrong-doing and therefore giving power to accomplish the baneful and prohibited results of its illegal organization. . . ." (*Id.* at 173)

This is essentially the same theory advanced by Kemper in its sixth affirmative defense, for although it must admit

that the contract is not illegal on its face it contends (a) that the ABC television network is an illegal entity because the ABC affiliates—the stations over which the network programs are carried—are bound to the network by virtue of illegal tying arrangements which, it is stated in paragraph 70 (PA "G," at p. 85a), have resulted in "combinations" between ABC and said affiliates having the purpose and effect of restraining competition in the manner alleged in said paragraph and (b), as alleged in paragraphs 77 and 81, ABC's sponsorship agreement with Kemper was imposed for the allegedly illegal purposes alleged in paragraphs 69 and 70 (PA "G," at pp. 88a-89a and 84a-85a). In other words, Kemper, like the defendant in the *D. R. Wilder Mfg. Co.* case, is relying upon a claim of collateral illegality in order to defeat its obligations under a contract that is not *itself* illegal. This approach was rejected by a unanimous Supreme Court in *D. R. Wilder Mfg. Co.*

Also significant is the observation in *D. R. Wilder Mfg. Co.* that the Sherman Act provides comprehensive remedies for its enforcement, which generally exclude the right of individuals to accomplish said enforcement. It was stated, at 174-75, quoting from *Farmers' & Mechanics' Nat. Bank* v. *Dearing,* 91 U. S. 29, 35 (1875), that "where a statute creates a new offense and announces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." Thus, the Court recognized that limitations must be placed upon the ability of a defendant in a contract action to assert the defense of illegality under the antitrust laws for the reason that such defense is an indirect sanction that conflicts with the general purpose of the antitrust statutes of limiting enforcement thereof to the specific remedies provided in the statutes themselves.

The aforesaid rules were crystallized in *A. B. Small Co.* v. *Lamborn & Co.,* 267 U. S. 248 (1925), wherein this Court,

citing the *Connolly, Continental Wall Paper Co.* and *D. R. Wilder Mfg. Co.* cases, *supra,* held at page 252:

> "It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense. *With that exception the remedies which the Act provides for violations of it are exclusive.*" (Emphasis added.)

The statements set forth in the *D. R. Wilder Mfg. Co.* and *A. B. Small Co.* cases concerning the remedies for antitrust violations were reiterated in 1947 in *Bruce's Juices, Inc.* v. *American Can Co.,* 330 U. S. 743 (1947), an action brought in a Florida state court for the balance due on a running account for goods sold and delivered.

The principal defense to the action was that plaintiff violated the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a, by selling goods to others at prices that discriminated against defendant, primarily through the granting of quantity discounts to defendant's competitors.

In addition, defendant brought an action against plaintiff for treble damages in the United States District Court for the Southern District of Florida (*id.* at 752) and to that extent the case is quite similar to the present case.

In affirming the decision of the Supreme Court of Florida disallowing the affirmative defense of illegality, this Court, in an opinion by Mr. Justice Jackson, stated at 750:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, 15 U.S.C. § 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 33 Stat. 731, 15

U.S.C. § 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.

"It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act."

Because the statute did not expressly make the contract of sale illegal and the purchase price uncollectible the Court held that there was no necessity to allow defendant to plead the defense of illegality and that defendant had an adequate remedy under the statute by reason of his treble damage action in the federal court, the remedy "Congress intended." *Id.* at 751-52.

Mr. Justice Jackson concluded by stating, at 757:

"We have assumed for the purposes of this case that petitioner could establish that the prices respondent charged were discriminatory so that they violated the Act. *But if petitioner can show that, clearly it would be entitled to recover in a triple damage suit supported by the same evidence.* For despite petitioner's plaint on the difficulty of proving damages, it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination. *No reason suggests itself why Congress should have intended a remedy by which the victim of discrimination could recover by defense only one-third of what he could recover, on the same proof, by offense. The inducement of thrice the damages suffered may bring the sufferer to aid in enforcement of the statute.* To assure his

> help, however, it would hardly be thought appropriate to offer him the choice of taking only one-third that amount. Since the remedy embodied in petitioner's second theory would be but a weak one-third shadow of the one Congress expressly gave, *we cannot see the need for judicial reduplication in miniature.*" (Emphasis added.)

This reasoning applies equally to the present case, for if Kemper has been damaged it can recover triple the amount of its damages in the Federal Court, to which it has already addressed its alleged grievance.

Also, the Court (citing *Connolly, D. R. Wilder Mfg. Co.* and *Continental Wall Paper Co., supra*) stated at 755-56 that where a contract "has as its object" illegal ends, the defense of illegality of contract can be interposed for "if, in order to prove his own case, the plaintiff proves his violation of law then no court will aid the plaintiff to recover"; however the courts will not allow the defense "when the contract sued upon is not intrinsically illegal." It is manifest that these principles were applied, and applied correctly, in the decision of the state court in the present case.

The most recent opinion by this Court on the subject is *Kelly* v. *Kosuga, supra,* the principal case relied upon by the state court (PA "A," at pp. 3-4a).

The plaintiff brought an action in the United States District for the Northern District of Illinois to recover the balance due on the purchase price of 50 cars of onions. Defendant's affirmative defense that the agreement was in violation of Section 1 of the Sherman Act was stricken and summary judgment was granted for the plaintiff.

Plaintiff and defendant were engaged in the marketing of onions. The defendant, who was also a grower of onions, alleged that plaintiff controlled approximately 600 cars of onions in the Chicago area and had threatened

to deliver them on the futures exchange "for the purpose of depressing the futures price and the cash market price of onions" unless defendant and the other growers purchased a large quantity of the onions controlled by plaintiff. *Id.* at 517.

Defendant and the other growers were fearful that dumping such a large quantity of onions on the market would cause them considerable loss and it was agreed that the growers would purchase 287 of the aforesaid cars of onions; plaintiff and the growers, including the defendant, agreed not to deliver any onions on the futures market for the remainder of the current trading season. It was alleged that this transaction was entered into by plaintiff " 'for the purpose of creating a false and fictitious market condition,' and 'to fix the price of onions and limit the amount of onions sold in the State of Illinois.' " *Ibid.*

Defendant purchased 50 of the cars of onions, took actual possession of 13 of said cars and then repudiated the agreement; plaintiff sold the remaining cars for defendant's account and sued for the unpaid purchase price less the amount that it obtained from the sale of the remaining cars.

Mr. Justice Brennan, on behalf of the majority of the Court, stated at page 518 that "the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court," and he remarked that in *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co., supra,* "the Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction" and that "the federal courts should not be quick to create a policy of non-enforcement of contracts beyond that which is clearly the requirement of the Sherman Act." 358 U. S. at 519. He added, at 520:

> "If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws,

as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general."

After referring to the "narrow scope in which the defense is allowed in respect of the Sherman Act" and commenting on the limiting effect upon *Continental Wall Paper* of the Court's subsequent unanimous decision in *D. R. Wilder Mfg. Co.*, Mr. Justice Brennan held that the defense will not be allowed "past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act" (358 U. S. at 520), and he concluded:

> "Accordingly, while the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price. And while analysis in terms of 'divisibility' or some other verbal formula may well be circular, see 6 Corbin, Contracts, § 1520, in any event, where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, *we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question.*" [Emphasis added.]

Thus, the Court reasoned (although it conceded that its analysis "may well be circular") that the part of the agreement providing that the parties would not deliver any of the onions on the futures market for the remainder of the season was divisible or separable from the other parts of the agreement and that by allowing plaintiff to recover the purchase price the Court would not "itself be enforcing

the precise conduct made unlawful by the Act''—the Court would not be "a party to the carrying out of one of the very restraints forbidden by the Sherman Act.'' *Id.* at 520.

A significant aspect of this decision is that it was extremely difficult to separate the illegal part of the contract—the non-delivery agreement—from the legal part of the contract, *for defendant had purchased the onions for the sole purpose of securing plaintiff's promise not to deliver its onions on the futures market.* The defendant, a grower of onions, was coerced into buying 50 cars of onions controlled by the plaintiff in order to protect the market price of onions in the Chicago area and, as defendant alleged, this had the effect of creating false and fictitious market conditions, fixing the price of onions and limiting the amount of onions sold in the State of Illinois. It was, therefore, open to argument that the agreement was *in toto* one in unreasonable restraint of trade within the meaning of Section 1 of the Sherman Act; but nevertheless the Court held that it did not fall within "the narrow scope in which the defense [of illegality] is allowed in respect of the Sherman Act.'' *Ibid.*

The key factor of the *Kelly* case is that the part of the agreement sought to be enforced—the purchase and sale of onions—was not illegal on its face or, in the language of Mr. Justice Harlan in the *Continental Wall Paper Co.* decision, it was "not in itself illegal.'' Paragraph 3 of the Complaint alleged that on or about December 17, 1955 defendant had purchased 50 carloads of onions from plaintiff, and annexed to the Complaint as Exhibit "A'' was a photostatic copy of a memorandum of agreement of purchase that merely recited the sale of said onions and the price. *Kelly* v. *Kosuga,* Record on Appeal, Appellant's Appendix, page 6.

The affirmative defense in the Amended Answer alleged that on December 11, 1955 plaintiff agreed with defendant and the other onion growers "that if they would purchase

a portion of said 600 carloads of onions, the plaintiff . . . would not deliver any onions on the futures market for the balance of the '55-'56 trading season." *Id.* at page 14. It was at this December 11, 1955 meeting and at a subsequent meeting on December 17, 1955 that defendant and other growers agreed to purchase from plaintiff 287 carloads of onions. *Id.* at page 15.

Thus, plaintiff's threat to deliver its onions on the futures market forced defendant to enter into the agreement of purchase and sale and its commitment not to deliver said onions was the inducement for said contract, but neither the threat nor the commitment formed a part of the agreement upon which the Complaint was based. Similarly, the "coercion" alleged in paragraphs 75 and 76 of Kemper's affirmative defense (PA "G," at pp. 87a-88a) did not form a part of the agreement that ABC sought to enforce. In both the *Kelly* case and the present case had the defense been allowed the court would have been required to go behind a contract valid on its face in order to engage in a "collateral method of enforcement of the antitrust laws" (*id.* at 520), a practice that this Court has never sanctioned.

It is difficult to distinguish the facts in *Kelly* v. *Kosuga* from those present in the instant case. In *Kelly* a written agreement provided for the purchase of 50 carloads of onions. In the present case the written agreement provides for telecasts over a period of 26 weeks. In *Kelly* defendant asserted that it was *coerced* in purchasing 50 carloads of onions that it did not want, which is similar to Kemper's claim. In the present case Kemper paid for 3 telecasts, refused to pay for the 4th telecast, and would not permit its commercials to be telecast during the balance of the programs. In *Kelly* when defendant breached the contract after receiving 13 of the carloads the remaining onions were removed from storage and were sold for the defendant's account and the defendant was held liable

for the resultant damages. In the present case when Kemper repudiated the contract ABC sold off to others the sponsorships reserved for Kemper and was awarded damages for the difference between the amount received and the contract price. The situation in both cases is almost identical.

On page 3 of its petition Kemper points out that it did not receive any benefit from its sponsorship of the "Evening Report" telecasts after the date of its cancellation of the contract, and on page 22 Kemper attempts to distinguish the *Bruce's Juices* case by referring to the fact that the defendant therein "was seeking to avoid payment for what it had already received, whereas in the instant case ABC is seeking to recover for post-cancellation programs that were not broadcast under Kemper's sponsorship." Its argument, both in the state courts and in its petition herein, is that although the defense might be disallowed when it is interposed for the purpose of preventing a defendant from acquiring plaintiff's goods or utilizing plaintiff's services without paying for them, it should not be disallowed when the defendant has not received anything under the contract.

The fact that no such distinction can be drawn is amply demonstrated by reference to the decision in *Kelly* v. *Kosuga,* for as previously stated the defendant therein actually received only 13 of the 50 cars of onions that it had agreed to take and thus received no benefit from the remaining 37 cars. After defendant repudiated the agreement, *plaintiff sold the remaining cars of onions for defendant's account* and if the only purpose of the court had been to prevent the defendant from avioding payment for something he had already received it would have allowed plaintiff to recover *only* the purchase price of the 13 cars of onions that defendant actually received; however, plaintiff was allowed to recover its damages resulting from defendant's failure to take the remaining 37 cars of onions.

Similarly, ABC is not merely entitled to recover the charges for the November 9, 1962 broadcast of the program "Evening Report" that was broadcast under Kemper's sponsorship as alleged in its first cause of action; it is also entitled under the second cause of action to recover damages because of Kemper's deliberate and willful repudiation of its legal obligation to sponsor the remaining broadcasts according to the terms of its contract.

Kemper also argues (p. 19) that the restraint upon trade alleged in its affirmative defense "is not collateral to or separable from the contract but inheres in the contract" and that the defense "expressly alleges the anti-competitive consequences that would flow from enforcement of the contract." Again, Kemper has misinterpreted the aforesaid cases for in each case the underlying illegality had anti-competitive effects (in the absence of which there would have been no antitrust violation) but this Court has held that where the contract was not itself illegal and did not have as its object an illegal restraint of trade "courts may not refuse" to enforce it "because of some indirect benefit to a wrongdoer which would be afforded from doing so." *D. R. Wilder Mfg. Co.* v. *Corn Products Co., supra,* at 172. Thus, where the contract is not illegal on its face the extrinsic anti-competitive consequences are considered collateral to the contract and separable from it. This rationale applies equally to tie-in practices, for as stated in *Hammond Ford, Inc.* v. *Ford Motor Co.,* 39 F.R.D. 604 (D.C.S.D.N.Y. Feb. 18, 1966) (not officially reported), a contract may or may not be "on its face . . . an illegal tying agreement," which is another way of saying that it may or may not be illegal "in itself." As Judge Bonsal therein stated, "cases which have found agreements on their face to be illegal tie-ins have involved clear provisions prohibiting the purchaser from buying the tied product from anyone other than the seller."

On the other hand, when the contract does not satisfy this test it should be enforced and the defendant should be restricted to use of the direct sanctions for violations of the antitrust laws provided in the statutes themselves.

Professor Milton Handler in his article entitled "Recent Developments in Antitrust Law: 1958-1959," 59 Colum. L. Rev. 843, 873 (1959), in discussing *Kelly* v. *Kosuga* as to its effect upon indirect sanctions, notes that the Court's holding "comes pretty close to sounding the death knell of this indirect sanction," and he makes the following cogent argument:

> "The difficulty with the denial of the purchase price is not merely that it is drastic and capricious. The patent misuse doctrine can be equally drastic and capricious. The trouble is that the sanction is too potent. It not only would end the business of antitrust violation; it would, as Mr. Justice Jackson pointed out in *Bruce's Juices,* end all business. Were the defense to be sustained, every suit for goods sold and delivered would be converted into an antitrust proceeding. The antitrust bar might thrive, but it is far from clear that the country itself would flourish. It is one thing to buttress the law with self-executing implementing devices; it is another to create conditions under which business cannot be carried on. It is thus encouraging that a large majority of the Court discerns the danger of overzealous antitrust enforcement."

POINT II

The decision of the state court refusing to allow petitioners to assert a violation of the Sherman Act as an affirmative defense in the breach of contract action does not violate the Supremacy Clause of the Constitution, and it does not have the effect of depriving petitioners of their right to an adjudication of the merits of the antitrust issue because petitioners can obtain full relief in their pending federal court action if they can establish a violation by respondent of the Sherman Act.

(A)

The aforementioned opinions of this Court have pointed out that the antitrust laws provide comprehensive remedies for their enforcement, which remedies the Court in *A. B. Small Co.* v. *Lamborn & Co., supra,* at 252, characterized as "exclusive," with but one exception: Where the contract is "inherently" illegal, the antitrust laws may be interposed as an affirmative defense to an action on the contract. In other words, with that exception the criminal and civil suits instituted by the Government and the treble damage and injunctive actions instituted in federal court by private parties are the sole remedies for violation of the antitrust laws. See the discussion of *Bruce's Juices, Inc.* v. *American Can Co.* at pages 16-18, *supra,* and also *D. R. Wilder Mfg. Co., supra,* at 174-75.

Because the federal courts have exclusive jurisdiction over these direct sanctions and because this Court has limited the indirect sanction of interposing an antitrust violation as an affirmative defense in a contract action, whether instituted in a state or a federal court, to the aforesaid extremely limited circumstances, the state court remarked that "to disallow the defense would be consistent with the policy that enforcement of the Federal antitrust laws should in general be in the Federal courts only" (PA "A," at p. 5a).

Kemper has used this statement as the foundation for its contention that the state court violated the Supremacy Clause of the Constitution, Article VI, Clause 2 (pp. 3-4 and 25-29 of the petition). This argument is based upon the false premise that said court applied a "state policy against recognition of the defense of antitrust illegality," which must "give way to the federal policy against enforcement of contracts in restraint of trade" (p. 25 of the petition).

Kemper's argument totally disregards the fact that the state court based its decision almost exclusively on two decisions of *this* Court (*Bruce's Juices, Inc.* v. *American Can Co.* and *Kelly* v. *Kosuga, supra*) which disallowed the defense in both a state court and a federal court action; Mr. Justice Silverman, the Appellate Division and the Court of Appeals of New York did *not* apply a state rule of law or state policy inconsistent with federal law, but federal law as determined by this Court.

Furthermore, the courts of the State of New York have consistently followed the federal rule on this subject. For example, in *Loew's, Inc.* v. *Radio Hawaii, Inc.*, 20 Misc. 2d 587 (Sup. Ct. N. Y. Co. 1959), a case involving a tying arrangement,* the court struck an affirmative defense of

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* This case is quite similar to the present case. Plaintiff licensed 752 motion pictures to KTVR, Inc. which operated a television station in Colorado. Defendants, as sole stockholders of KTVR, Inc., guaranteed the station's full performance of the contract. Upon the station's default, Loew's Inc. brought an action against defendants, who interposed an affirmative defense alleging that the station had been required to take the whole package of 752 films, a "block booking practice" which has been held to be an illegal tie-in arrangement in violation of § 1 of the Sherman Act. See *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 156-59 (1948).

In addition, KTVR, the "wholly owned tool of defendants," had instituted an action against plaintiff in federal court "identical with the substance and legal effect of the defenses herein interposed." 20 Misc. 2d at 588-89.

antitrust illegality in an opinion stating that "the present controversy in this litigation and on the facts here undisputed will turn on the effect of the recent United States Supreme Court decision in *Kelly v. Kosuga.*" *Id.* at 589. Similarly, in *Fleet-Wing Corp.* v. *Peas Oil Co.*, 29 Misc. 2d 437 (Sup. Ct. Erie Co.), aff'd 14 A. D. 2d 728 (4th Dept. 1961), the court struck an affirmative defense of illegality in an opinion stating, at 439-40:

> "An affirmative defense charging violation of the antitrust laws must be struck down upon motion to dismiss unless the contract for the sale of goods is alleged to be an integral part of the illegal conspiracy. The contract must *in itself* carry out the terms of the illegality and be *part and parcel* of the violations to allow the defense to stand. This is made abundantly clear by the United States Supreme Court in deciding the recent case of *Kelly* v. *Kosuga* (358 U. S. 516 [1959]) *which is controlling in the instant case.*" [Emphasis added.]

(B)

After referring to the policy that enforcement of the antitrust laws should in general be in the federal courts only, the state court in the present case added (PA "A," at p. 5a):

> "This consideration is particularly apropos where as here defendants are actually pressing a suit in the Federal court for relief under the antitrust laws. In that suit defendants, if entitled to it, can get full relief, bearing a rational relationship to the damage if any that they may have suffered. . . . There is also an obvious advantage in not litigating these long drawn out and expensive antitrust questions in two courts."

This is a point of considerable significance, for when a plaintiff suing on a sales agreement or an agreement for

the performance of services is faced with a defense of illegality under the antitrust laws, he is placed at a tremendous disadvantage. Antitrust issues are usually complicated, involving among other things considerable pretrial discovery, and if the defense of illegality is as a general rule allowed it could be used by defendants as a dilatory tactic, as an instrument for harassment and for the purpose of causing such expense to a plaintiff that he will be induced to compromise his claim on his contract.

If the raising of the antitrust issue is not merely a tactical maneuver and if a defendant honestly believes that there was a violation of the antitrust laws, he can and probably will bring (as Kemper did) a treble damage action in a federal court. Thus, if the antitrust defense is allowed in the state court action, plaintiff will be placed in the position of litigating the identical antitrust issues in two different courts. This would violate the general rule against multiplicity of suits and create confusion because the determination of the antitrust issues in the state court proceeding would have no effect whatever upon the ultimate determination of plaintiff's liability, if any, for violating the antitrust laws; the federal court would not be bound by the state court's decision on the antitrust issues. *Lyons* v. *Westinghouse Electric Corp.*, 22 F. 2d 184 (2nd Cir.), cert. den. 350 U. S. 825 (1955).

The effect of the Supreme Court rules restricting the use of the defense is especially salutary in the light of these considerations. If the contract or the part thereof that plaintiff seeks to enforce is "in itself illegal" or if it has as its "object . . . illegal ends" (*Continental Wall Paper Co., supra*), the state court can entertain the defense and refuse to enforce the contract without becoming involved in long and complicated antitrust litigation. But where, as in *Kelly* and the present case, the Court would

have to go behind the contract in order to determine whether there has been a violation of the antitrust laws, the defendant should be left to his remedy of a federal court treble damage action.

ABC, of course, denies that there was any tie-in or coercion in connection with the negotiation of the contract herein and has vigorously defended its position in the federal court, but the merits of the case are not germane to the basic pleading question involved herein. In any event, if in its federal court action Kemper can prove ABC's violation of the Sherman Act then under its theory of the case it will be entitled to judgment against ABC for treble damages based upon ABC's time charges for the network stations that Kemper allegedly did not want, together with counsel fees. It will have its day in court and if it prevails it can in effect obtain a repayment of part of ABC's state court judgment, trebled.

POINT III

The cases cited by petitioners do not support their contention that the state court should have allowed them to interpose a defense based upon the Sherman Act.

(A)

As a preliminary matter, it must be noted that the main thrust of the petition appears to be that the affirmative defense pleads a violation of the Sherman Act and, *ipso facto,* the state court should not have stricken the defense. It is apparent, therefore, that Kemper has completely misconceived the nature and effect of both the holding of the state court and the previously discussed decisions of this Court, which were in no way related to the merits of the antitrust questions.

For example, in *Kelly* v. *Kosuga, supra,* the court stated in a footnote appearing on page 518:

> "Without deciding the point, we shall assume that the petitioner's allegations duly charged a violation of the Sherman Act."

Similarly, the decision of the state court in the instant case (which, as previously stated, was rendered subsequent to the federal court decision denying ABC's motion to dismiss Kemper's antitrust complaint containing allegations practically identical to those set forth in its state court affirmative defense) was not concerned with the merits of Kemper's allegations. The issue before the court, which was the same issue decided in each of the aforesaid decisions of this Court, was simply whether, assuming a violation of the antitrust laws was adequately pleaded, the defendant would be allowed to interpose the violations of the antitrust laws in order to defeat the plaintiff's cause of action on the contract.

Under the section of its petition entitled "Reasons for Granting the Writ" Kemper has argued at great length (pp. 10-18) that ABC has violated § 1 of the Sherman Act by imposing a "must-buy" policy upon Kemper which required Kemper to sponsor the program over a specified lineup of television stations, and it relies heavily on Law Review articles and Congressional Committee reports which, of course, have no probative or evidentiary value. Although it is clear as aforesaid that the merits of Kemper's claim are not an issue on this application and that Kemper's arguments in its petition with respect thereto are thus completely irrelevant to the question which Kemper seeks to have this Court review, we would be remiss in failing to call to the Court's attention the following.

(i) The defense does not allege that ABC imposed a "must-buy" policy on Kemper. It alleges in paragraph 75

that ABC informed Kemper "that it would charge a rate for the broadcast time on the 95 desired stations that far exceeded the rate for the broadcast time for the total of 130 stations which included both the desired 95 stations and the undesired 35 stations," and that the alleged "excess" rate was "unrelated to any cost differential to ABC" (PA "G," at p. 87a). Thus, it is not alleged that ABC refused to allow Kemper to sponsor the program over the 95 "desired" stations unless Kemper would agree to take the 35 "undesired" stations and that Kemper had to take all 130 stations, which is the "must-buy" practice discussed in the said Law Review articles and Congressional Committee reports. Indeed, the "must-buy" practice criticized in said documents was specifically referred to as a practice engaged in by the other two major television networks, NBC and CBS. Kemper has failed to point out, for example, that in *Network Broadcasting,* Report of House Committee on Interstate Commerce, H. R. Rep. 1297, 85th Cong., 2d Sess. (1958), it was stated at page 497 that ABC "never had a regular 'must buy' group of stations in its television operations," and at pages 524-25 the Committee's report recommends the elimination of the NBC and CBS "must-buy" requirements or, in the alternative, a "modification of the practice along the lines of the ABC requirement," such as

> "a minimum dollar requirement (the present ABC practice); a minimum number of stations; or a minimum percentage of the total network (as measured by the aggregate of station rates or of station circulation)."

(ii) "Evening Report" was a multi-sponsored program telecast five evenings per week under the sponsorship of various advertisers, and at the time Kemper expressed an interest in becoming a partial sponsor of the program it was then being telecast over a specific lineup of ABC network stations. In essence, Kemper is complaining that

ABC would not allow it to sponsor the program over a lineup of stations different from the lineup of stations then carrying the program under the sponsorship of all of the other "Evening Report" advertisers, which raises numerous issue as to the reasonableness of ABC's alleged "coercion." For example, it was stated in *Network Broadcasting*, *supra*, at page 501:

> "When two or more advertisers are sponsoring a program or program series, certain problems arise if the lineup of stations is different for the individual advertisers. Unordered stations must be 'cued' by electronic signal to delete the commercial message in the program or program segment for which they are not ordered. In connection with programs having different days of the week (e.g., daytime 'strip' programs)* arrangements must be made with the advertiser or advertisers to make the program available to unordered stations on a sustaining basis, whenever possible. If opening and closing 'billboards' are used, they must take into account the fact that all of the sponsors may not have their messages on all of the stations. More important, individual stations that are not ordered by all or the majority of the advertisers may be reluctant to accept the program."

The Report recommended that the Federal Communications Commission should prohibit the "must-buy" practice of NBC and CBS but even this practice (which ABC does not engage in) was considered reasonable under some circumstances, for with the above considerations in mind the Report recommended, at page 527:

> "In the course of rulemaking, the Commission should consider the desirability of an exception in the case of multiweekly programs sold in small time segments to a substantial number of different advertisers."

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* Or, as another example, "Evening Report."

This, of course, is a description of "Evening Report."

(iii) Because the aforesaid allegations of paragraph 75 of the answer do not predicate the alleged tie-in upon a refusal to sell the tied product or service (a "must-buy" practice) but instead rely upon a tie-in accomplished through use of pricing differentials, the defense raises many of the same issues ruled upon in *United States* v. *Loew's, Inc.*, 189 F. Supp. 373, 386, 389-91, 395-97 (D. C. S.D.N.Y. 1960), aff'd 371 U. S. 38 (1962) with respect to, *inter alia*, the offering of "unit prices" in addition to the package price, cost and other justification for the package price, the right of a seller to refuse to allow a package price discount when the buyer does not wish to purchase the entire package and the right of a seller to charge a higher price per unit when the purchaser wants to select only the better units in the package. These extremely relevant issues are not remotely alluded to in the petition, and thus Kemper's discussion of the merits of its affirmative defense is extremely misleading.

These are but a very few of the many substantive issues raised by the affirmative defense (and Kemper's federal court complaint), all of which should be tried, if at all, in the pending federal action.

(B)

In addition to its irrelevant argument with respect to the merits of the affirmative defense, Kemper has cited various decisions addressed to the issue of whether the defense can be interposed, and it places great reliance upon *Associated Press* v. *Taft-Ingalls Corp.*, 340 F. 2d 753 (6th Cir. 1965), cert. den. 382 U. S. 820 (1965).

Kemper's apparent position is that this Court should grant certiorari if for no other reason than the existence of this decision, for it states at page 23 of its petition that review of the state court decision by this Court "is necessary in order to resolve the conflict" between said decision

and the decision in the *Associated Press* case. However, this is not a Supreme Court decision* and Rule 19 of the rules of this Court refers only to (a) a conflict between a state court decision and applicable Supreme Court decisions and (b) conflicts between United States Courts of Appeals. There is no third category, *i.e.*, conflicts between state court decisions and decisions of a United States Court of Appeals (even if a conflict did exist).

The inescapable fact is that the decision of the state court does not conflict with any decision of *this* Court, and thus the petition should be denied.

Furthermore, Kemper's emphasis on this case is entirely misplaced, for as compared to the present case its dissimilarities are more marked than its similarities.

In the first place, the pleading question here was never raised and the judgment in that case was rendered after a trial on the merits.

Secondly, one of the principal distinguishing factors is that this case was an action for breach of contract in a *Federal* court in which the defendant raised the antitrust issue in the form of both an affirmative defense and a counterclaim for treble damages. Thus, the issue was capable of being decided in one forum—the forum to which enforcement of the antitrust laws is limited—and in one proceeding, thereby avoiding the problem of multiplicious litigation of antitrust issues inherent in Kemper's position in the present case. See *Bruce's Juices* v. *American Can Co., supra.*

The court could have ignored the tie-in issue raised by the affirmative defense, but it would have been required to

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* The fact that this Court denied certiorari is of no significance. The denial of a petition for a writ of certiorari "imports no expression of opinion upon the merits of the case" and "does not imply approval of anything that may have been said by the lower court in support of its decision." *Agoston* v. *Pennsylvania*, 340 U. S. 844 (1950).

evaluate and pass upon this identical issue in the counterclaim, which the defendant had a clear right to interpose. On the other hand, the decision of Mr. Justice Silverman, as unanimously affirmed by both the Appellate Division and the Court of Appeals, gave due recognition to the fact that the antitrust issue raised by Kemper in its sixth affirmative defense also was raised in Kemper's action against ABC then pending, and still pending, in Federal court, a factor not present in the *Associated Press* case. A disallowance of the defense in that case clearly would have been anomalous and illogical because of the presence of the counterclaim; its disallowance herein was both logical and practical.

Thirdly, and perhaps even more important, is Kemper's erroneous statement on page 24 of its petition that in the *Associated Press* case the illegality did not appear "on the face" of the contract.

The Associated Press is a membership corporation, and newspaper publishers (including the defendant) were required to become members in order to utilize its news wire services. *Id.* at 755. The stipulation of facts presented at trial stated that the members were required to enter into a contract with the corporation, that "the contract *and the By-laws* of the AP constituted the agreement between the corporation and the members" (emphasis added) and that defendant became a member of the AP and entered into the standard form contract required by the By-laws.*

Section 8 of the By-laws provided that before an applicant could be elected as a member, it "shall have entered into a contract with the Corporation" providing that the corporation "shall furnish and the member shall receive and use a regular news service of the Corporation";** the

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* The relevant portions of the stipulation are set forth in the Appendix to this brief, Note (A).

** See Appendix Note (B).

standard form contract signed by defendant stated that defendant would take a "leased wire news service" of the corporation and the said By-laws were incorporated in the contract by reference.* In the aforesaid stipulation plaintiff and defendant agreed that "the leased wire news service referred to in the above contract" consisted of a general news wire ("the 'A' trunk circuit"), a financial and business news wire ("the 'D' trunk circuit") and an Ohio regional and general wire ("the Ohio Big Cities circuit"). *Id.* at 757.

The affirmative defense and the counterclaim were based upon the fact that defendant subsequently asked the Associated Press if it could take only the Ohio Big Cities circuit, eliminating the "A" and "D" circuits (and a Kentucky wire), a request that the Associated Press denied. *Ibid.*

The specific holding of the court on the merits of the affirmative defense and counterclaim was as follows:

> "We further hold that the established practice of AP in requiring appellant to receive and pay for the 'A' and 'D' wires, plus the Kentucky state wire, as a prerequisite to receiving the Ohio Big Cities wire, constituted a tying arrangement susceptible to violation of Section 1 of the Sherman Act." [*Id.* at 766]

Because the By-laws on their face contained a requirement that defendant take the "regular news service of the corporation" (consisting of the "A," "D" and Ohio Big Cities circuits) as a condition of membership and because the said By-laws were part of the contract between plaintiff and defendant, it follows that the agreement before the court was one of the type that is "on its face . . . an illegal tying agreement" (see *Hammond Ford, Inc.* v. *Ford Motor Co., supra*).

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* See Appendix, Note (C).

A fourth distinction is that a disallowance of the defense, either on the ground that it could not be interposed or on the merits, would have caused an extreme hardship to defendant.

The defendant agreed to give the AP two years' written notice of termination of the aforesaid contract and it further agreed that in the event of a sale of the newspaper it would cause the purchasers to agree in writing to fulfill the terms of the said contract. In July, 1958 defendant discontinued publication and sold its newspaper to E. W. Scripps Co.; however, it did not give the AP the required two years' notice of cancellation and Scripps did not become a member of the AP. Thus, the latter sued defendant for the weekly assessments for its wire services for the two succeeding years, amounting to $158,703.43. 340 F. 2d at 755-56.

The bulk of the court's opinion relates to the merits of the defendant's affirmative defense and counterclaim; the question of whether the alleged antitrust violation could be interposed as an affirmative defense to plaintiff's action for breach of contract was briefly discussed on page 769, wherein the court based its holding in defendant's favor on its finding that the defense had been interposed

> "to avoid paying weekly assessments for two years after appellant had ceased publication of Times-Star and had sold its newspaper."

No doubt the majority of the court felt that it would have been unjust to require defendant to pay for the AP wire service for a period of two years subsequent to the time that it sold its newspaper, when it was thus in *no position to utilize said services* in any way. A holding prohibiting defendant from asserting the defense would have required defendant to pay over $158,000 for news wire services when it no longer had a newspaper for which they could be used merely because, as a result of the sale of

said newspaper, it had not been in a position to give the required two years' notice of discontinuance, a technicality the enforcement of which the courts will attempt to avoid if at all possible.*

Furthermore, it is not without significance that notwithstanding this consideration two of the four judges who considered this issue (the Trial Judge and Circuit Judge O'Sullivan, in a well-reasoned dissent) held that the affirmative defense could not be interposed. Judge O'Sullivan's reasoning was based upon the most recent Supreme Court case, *Kelly* v. *Kosuga,* and he could find no distinction between the *Kelly* case and the case then before the court. Kemper's erroneous assumption (which is apparent from its quotation from the *Kelly* case on p. 21 of its petition) is that the defendant in *Kelly* was attempting to avoid payment for something that it had received, and Kemper implies that the sole purpose of the Court in disallowing the defense was to prevent unjust enrichment. Judge O'Sullivan, however, observed (340 F. 2d at 777):

> "It is significant that Kelly *had not received or used* the onions which were the subject of the suit. . . .
>
> "The action against Kelly was not for the price of onions which he had received and used, but was for damages for failure to take the undelivered portion

---

* At first glance it may appear that defendant would have benefited from a disallowance of the defense on procedural grounds because part of the damages it thus would have been required to pay to plaintiff for breach of the illegal agreement would have been returned to it threefold under its treble damage counterclaim. However, this is definitely not the case, for the trial court *dismissed* the counterclaim on the ground that defendant had failed to satisfy its burden of proving its damages, i.e., the separate cost of the wires it did not want. The Circuit Court affirmed, holding that defendant's evidence was too speculative. *Id.* at 765 and 769. Thus, if the defense had been disallowed, plaintiff would have recovered $158,703.43 and defendant would have received nothing on its counterclaim.

of the total agreed to be purchased." (Emphasis by Judge O'Sullivan.)

Kemper points out on page 24 of its petition that although the *Associated Press* case was decided prior to the unanimous decision of the New York Court of Appeals affirming (without opinion) the order striking Kemper's affirmative defense, "that court did not attempt to reconcile its decision with that of the Sixth Circuit." It is obvious from the foregoing that there was no necessity for the Court of Appeals to write an opinion distinguishing the *Associated Press* case, for said case is not apposite both as to the facts and pleadings involved and the forum in which it was tried.

Kemper has also cited several decisions of this Court, but they are perfectly consistent with the decisions discussed in Point I, *supra*.

McMullen v. *Hoffman*, 174 U. S. 639 (1899), cited on page 19 of the petition, did not involve the Sherman Act and, furthermore, it is of the utmost significance that the contract therein was illegal on its face. The court stated, at pages 654 and 655, that the agreement "is as a whole of an illegal nature" and that it "contains utterly illegal provisions."

Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U. S. 373 (1911), *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8 (1918) and *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), cited on page 20, are not apposite here, and, moreover, each of said cases was an action for an injunction against violations of or interference with an agreement that was illegal on its face.

In the most recent of said cases, *Standard Fashion Co.*, the Court affirmed a lower court decision that found a violation of Section 3 of the Clayton Act "within the four corners of the contract" (*id.* at 347), in *Dr. Miles Medical Co.* the agreements were "designed to" and had as their "sole purpose" the fixing of prices and destruction of competition (220 U. S. at 407-08) and in *Boston Store* the

action was brought to enforce a price maintenance agreement (246 U. S. at 20).

On page 20 Kemper cites three patent license cases, *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173 (1942), *Katzinger* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394 (1947) and *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402 (1947) and on page 22 it makes the erroneous statement that in said cases "the illegality turned on the extrinsic fact that the patent was invalid." To the contrary, each agreement on its face contained a provision that was in itself illegal.

In *Sola Electric Co.*, the court stated at the beginning of its opinion:

> "The question for our decision is whether a patent licensee, by virtue of his license agreement, is estopped to challenge *a price-fixing clause in the agreement* by showing that the patent is invalid, and that the price restriction is accordingly unlawful because not protected by the patent monopoly." (Emphasis added)

The patent license agreements in *Katzinger* and *MacGregor* also contained price-fixing clauses.

Conclusion

The decision of the Supreme Court of the State of New York striking Kemper's sixth affirmative defense, as unanimously affirmed by the Appellate Division of the Supreme Court and by the New York Court of Appeals, is in full accord with each and every relevant decision of this Court, and judged by the provisions of Rule 19 no basis appears for granting the petition for a writ of certiorari herein.

Respectfully submitted,

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Of Counsel.

APPENDIX

Containing Portions of the Record Before the United States Court of Appeals for the Sixth Circuit in *Associated Press* v. *Taft-Ingalls Corp.*, 340 F. 2d 753 (1965), No. 15,514 (Page References are to "Appendix for Defendant-Appellant")

Note (A)—Plaintiff's Exhibit 7, "Stipulation of Facts," pp. 420a and 421a:

"'9. In the year 1945, the By-laws of the AP were amended to provide that each member was required to enter into a contract with the corporation in such form as the Board of Directors should prescribe and which should provide that the corporation would furnish and the member would receive and use a regular news service of the corporation for the purpose and in the manner therein prescribed. Subsequent to the adoption of the amendments to the By-laws in 1945, the Board of Directors on January 10, 1946 prescribed the standard form of contract to be signed by each regular member of the AP. In April 1946, the Board of Directors approved an amendment to Paragraph 9 of the standard form of contract between the AP and its members. Since 1947 as such contracts were executed, the contract and By-laws of the AP constituted the agreement between the corporation and its members.

• • •

"'1. . . .

(c) In the year 1931, the Cincinnati Times-Star Company [defendant's original name], as the successor of Hulbert Taft, applied for and was admitted to membership in the AP, at which time the Cincinnati Times-Star Company, through its authorized agent, signed the Roll of Members of the AP and agreed to be bound by its charter and By-laws as a member of the AP.

"12. On or about August 4, 1948, the Times-Star entered into a contract with the AP in the standard form prescribed by the By-laws thereof, a copy of which is attached to and made a part of the complaint in this action and marked Exhibit A."

Note (B)—Plaintiff's Exhibit 6, By-laws of Associated Press, p. 401a:

"SEC. 8. An applicant for membership elected as prescribed by these By-Laws shall not be admitted to membership or be entitled to any of the rights or privileges of membership until he or it shall have signed a written assent to be bound by the By-Laws, and any amendments thereto which may be thereafter regularly adopted, and shall have entered into a contract with the Corporation which shall provide that the Corporation shall furnish and the member shall receive and use a regular news service of the Corporation for the purpose and in the manner therein prescribed. In other respects it shall be in such form and shall contain such provisions as shall be prescribed by the Board of Directors."

Note (C)—Exhibit A annexed to complaint, agreement between plaintiff and defendant, pp. 7a-9a:

"1. The parties hereby agree that during the term of this agreement, The Associated Press will furnish to the Member—barring conditions beyond the control of The Associated Press—and the Member shall publish 6 days a week, not earlier than 9 A. M. and not later than 7 P. M., Local Time, in the city of publication, a leased wire news service of The Associated Press, in whole or in part, in the afternoon newspaper known as The Cincinnati Daily Times-Star, owned by the Member and published at Cincinnati, Ohio, upon the terms and conditions hereinafter set forth.

• • •

"6. In the event that any of the terms and conditions of this agreement shall be or become contrary to or inconsistent with the By-Laws of The Associated Press, the By-Laws shall control.

"7. The provisions hereof and the By-Laws of The Associated Press constitute the whole agreement between parties hereto, and no oral modification hereof, or oral additions hereto, shall be binding."

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Supreme Court of the United States

October Term, 1966

No. 490

AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., AMERICAN MOTORISTS INSURANCE CO., FEDERAL MUTUAL INSURANCE CO., and LUMBERMENS MUTUAL CASUALTY CO.,

Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HERBERT BROWNELL
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New York, New York 10004

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WENDELL DAVIS, JR.
LORD, DAY & LORD
Of Counsel

October 11, 1966

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Other Authorities:

Handler, *Recent Developments in Antitrust Law: 1958-1959,* 59 Colum. L. Rev. 843 (1959) 11

Stern and Gressman, *Supreme Court Practice* (3d ed. 1962) 12